UNITED NATIONS

GENERAL
ASSEMBLY

Distr.
GENERAL

A/CN.9/423
10 April 1996

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Twenty-ninth session
New York, 28 May - 14 June 1996

INTERNATIONAL COMMERCIAL ARBITRATION

Draft Notes on Organizing Arbitral Proceedings

Report of the Secretary-General

1. The decision by the Commission to commence work on this project was taken at its twenty-sixth session in 1993 (report of the session: document A/48/17, paras. 291-296). Pursuant to that decision, the Secretariat prepared "draft Guidelines for Preparatory Conferences in Arbitral Proceedings" (document A/CN.9/396/Add.1), which the Commission discussed at its twenty-seventh session in 1994 (report of the session: document A/49/17, paras. 111-195). Pursuant to those discussions, the Secretariat prepared a text entitled "draft Notes on Organizing Arbitral Proceedings" (document A/CN.9/410). The draft Notes were considered at the twenty-eighth session of the Commission in 1995 (report of the session: document A/50/17, paras. 314-373); on the basis of those considerations the Secretariat prepared the revised draft Notes, reproduced in the annex.

V.96-81478

Annex

[Suggested for inclusion at suitable place at beginning of publication]

Origin of the Notes

The Commission finalized the Notes at its twenty-ninth session (New York, 28 May - 14 June 1996). In addition to the 36 member States of the Commission, representatives of many other States and of a number of international organizations had participated in the deliberations. In preparing the draft materials, the Secretariat consulted with experts from various legal systems, national arbitration bodies, as well as international professional associations.

The Commission, after an initial discussion on the project in 1993,1/ considered in 1994 a draft entitled "Draft Guidelines for Preparatory Conferences in Arbitral Proceedings".2/ That draft was also discussed at several meetings of arbitration practitioners, including the XIIth International Arbitration Congress, held by the International Council for Commercial Arbitration (ICCA) at Vienna from 3 to 6 November 1994.3/ On the basis of those discussions in the Commission and elsewhere, the Secretariat prepared "draft Notes on Organizing Arbitral Proceedings".4/ The Commission considered the draft Notes in 1995,5/ and a revised draft in 1996,6/ when the Notes were finalized.7/

---

1 Report of the United Nations Commission on International Trade Law on the work of its twenty-sixth session, Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17) (reproduced in UNCITRAL Yearbook, vol. XXIV: 1993, part one), paras. 291-296.

2 The draft Guidelines have been published as document A/CN.9/396/Add.1 (reproduced in UNCITRAL Yearbook, vol. XXV: 1994, part two, IV); the considerations of the Commission are reflected in the report of the United Nations Commission on International Trade Law on the work of its twenty-seventh session, Official Records of the General Assembly, Forty-ninth Session Supplement No. 17 (A/49/17) (reproduced in UNCITRAL Yearbook, Vol. XXV: 1994, part two, IV), paras. 111-195.

3 The proceedings of the Congress are published in Planning Efficient Arbitration Proceedings/The Law Applicable in International Arbitration, ICCA Congress Series No. 7, Kluwer Law International, The Hague, 1996.

4 The draft Notes have been published as document A/CN.9/410 (and will be reproduced in UNCITRAL Yearbook, vol. XXVI: 1995, part two, III).

5 Report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session, Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17) (and will be reproduced in UNCITRAL Yearbook, vol. XXVI: 1995, part one), paras. 314-373.

6 The revised draft Notes have been published as document A/CN.9/423 (and will be reproduced in UNCITRAL Yearbook, vol. XXVII: 1996, part two).

7 ...

Draft

NOTES ON ORGANIZING ARBITRAL PROCEEDINGS

Purpose of the Notes

1. The purpose of the Notes is to assist arbitration practitioners by listing and briefly describing questions on which appropriately timed decisions on organizing arbitral proceedings may be useful. The text, prepared with a particular view to international arbitrations, may be used whether or not the arbitration is administered by an arbitral institution.

Non-binding character of the Notes

2. No legal requirement binding on the arbitrators or the parties is imposed by the Notes. The arbitral tribunal remains free to use the Notes as it sees fit and is not required to give reasons for disregarding them.

3. The Notes are not suitable to be used as arbitration rules, since they do not establish any obligation of the arbitral tribunal or the parties to act in a particular way. Accordingly, the use of the Notes cannot imply any modification of the arbitration rules that the parties may have agreed upon.

Discretion in conduct of proceedings and usefulness of timely decisions on organizing proceedings

4. Subject to the law governing the arbitral procedure, including fundamental requirements of procedural justice, arbitration rules agreed upon by parties typically allow the arbitral tribunal broad discretion and flexibility in the conduct of arbitral proceedings.[8] This is useful in that it enables the arbitral tribunal to take decisions on the organization of proceedings that take into account the circumstances of the case, the expectations of the parties and of the members of the arbitral tribunal, and the need for a just and cost-efficient resolution of the dispute.

5. Such discretion may make it desirable for the arbitral tribunal to give the parties a timely indication as to the organization of the proceedings and the manner in which the tribunal intends to proceed. This is particularly desirable in international arbitrations, where the participants may be accustomed to differing styles of conducting arbitrations. Without such guidance, a party may find aspects of the proceedings unpredictable and difficult to prepare for. That may lead to misunderstandings, delays and increased costs.

---

[8] A prominent example of such rules are the UNCITRAL Arbitration Rules, which provide in article 15(1): "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case."

Multi-party arbitration

[Variant 1:]
[If this variant is used, paragraphs 87-89 (item 18) should be deleted.]

6. Two-party arbitration and multi-party arbitration (i.e., a single arbitration that involves more than two parties) are not different as regards considerations about the need to organize arbitral proceedings, and as regards the kinds of matters that may be considered in that connection. A possible difference may be that, because of the need to deal with more than two parties, multi-party proceedings can be more complicated to manage than bilateral proceedings. Another difference, which, however, falls outside the scope of the Notes, concerns the drafting of a multi-party arbitration agreement and the constitution of the arbitral tribunal, both issues that may give rise to special difficulties in multi-party arbitration. Therefore, the Notes, limited to pointing out matters that may be considered in organizing arbitral proceedings in general, can be used in two-party as well as multi-party proceedings.

[Variant 2:]

7. These Notes are intended for use not only in arbitrations with two parties but also in arbitrations with three or more parties. Use of the Notes in multi-party arbitration is referred to below in paragraphs 87 to 89 (item 18).

Process of making decisions on organizing arbitral proceedings

8. Decisions by the arbitral tribunal on organizing arbitral proceedings may be taken with or without previous consultations with the parties. The method chosen depends on whether, in view of the type of the question to be decided, the arbitral tribunal considers that consultations are not necessary or that hearing the views of the parties would be beneficial for increasing the predictability of the proceedings or improving the procedural atmosphere.

9. The consultations, whether they involve only the arbitrators or also the parties, can be held in one or more meetings, or can be carried out by correspondence or telecommunications such as telefax or conference telephone calls. Meetings may be held at the venue of arbitration or at some other appropriate location.

10. In some arbitrations a special meeting may be devoted exclusively to such procedural consultations; alternatively, the consultations may be held in conjunction with a hearing on the substance of the dispute. Practices differ as to whether such special meetings should be held and how they should be organized. Special procedural meetings of the arbitrators and the parties separate from hearings are in practice referred to by expressions such as "preliminary meeting", "pre-hearing conference", "preparatory conference", "pre-hearing review", or terms of similar meaning. The terms used partly depend on the stage of the proceedings at which the meeting is taking place.

List of matters for possible consideration in organizing arbitral proceedings

11. The Notes provide a list, followed by annotations, of matters on which the arbitral tribunal may wish to formulate decisions on organizing arbitral proceedings.

12. Bearing in mind that procedural styles and practices in arbitration vary widely, that the purpose of the Notes is not to promote any practice as best practice, and that the Notes are designed for universal use, the Notes do not attempt to describe in detail different arbitral practices or express a preference for any of them.

13. The list, while not exhaustive, covers a broad range of situations that may arise in an arbitration. In many arbitrations, however, only a limited number of the matters mentioned in the list need to be considered. It also depends on the circumstances of the case at which stage or stages of the proceedings it would be useful to consider matters concerning the organization of the proceedings. Generally, in order to not create opportunities for unnecessary discussions and delay, it is advisable not to raise a matter prematurely, i.e., before it is clear that a decision is needed.

14. When using the Notes, it should be borne in mind that the discretion of the arbitral tribunal in organizing the proceedings may be limited by arbitration rules and by the law applicable to the arbitral procedure. When an arbitration is administered by an arbitral institution, various matters discussed in the Notes may be covered by the rules and practices of that institution.

LIST OF MATTERS FOR POSSIBLE CONSIDERATION IN ORGANIZING ARBITRAL PROCEEDINGS

	Paragraphs	Page
1. **Set of arbitration rules**	15-17	9
If the parties have not agreed on a set of arbitration rules, would they wish to do so	15-17	9
2. **Language of proceedings**	18-21	9
(a) Possible need for translation of documents, in full or in part	19	9
(b) Possible need for interpretation of oral presentations	20	9
(c) Cost of translation and interpretation	21	10
3. **Place of arbitration**	22-24	10
(a) Determination of the place of arbitration, if not already agreed upon by the parties	22-23	10
(b) Possibility of meetings outside the place of arbitration	24	10
4. **Administrative services that may be needed for the arbitral tribunal to carry out its functions**	25-28	10
5. **Deposits in respect of costs**	29-31	11
(a) Amount to be deposited	29	11
(b) Management of deposits	30	12
(c) Supplementary deposits	31	12
6. **Confidentiality of information relating to the arbitration; possible agreement thereon**	32-33	12
7. **Routing of writings among the parties and the arbitrators**	34-35	12
8. **Telefax and other electronic means of sending writings**	36-38	13
(a) Telefax	36	13
(b) Other electronic means (e.g., electronic mail, magnetic or optical disk)	37-38	13
9. **Arrangements for the exchange of written submissions**	39-42	14
(a) Scheduling of written submissions	40-41	14
(b) Consecutive or simultaneous submissions	42	14

	Paragraphs	Page
9. **Arrangements for the exchange of written submissions**	39-42	14
(a) Scheduling of written submissions	40-41	14
(b) Consecutive or simultaneous submissions	42	14
10. **Practical details concerning written submissions and evidence (e.g., copies, numbering of items of evidence, references to documents, numbering of paragraphs)**	43	15
11. **Defining points at issue; order of deciding issues; defining relief or remedy sought**	44-47	15
(a) Should a list of points at issue be prepared	44	15
(b) In which order should the points at issue be decided	45-46	15
(c) Is there a need to define more precisely the relief or remedy sought	47	16
12. **Possible settlement negotiations and their effect on scheduling proceedings**	48	16
13. **Documentary evidence**	49-55	16
(a) Time-limits for submission of documentary evidence; intended to be submitted by the parties; consequences of late submission	49-50	16
(b) Whether the arbitral tribunal intends to require a party to produce documentary evidence	51-52	16
(c) Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate	53	17
(d) Are the parties willing to submit jointly a single set of documentary evidence	54	17
(e) Should voluminous and complicated documentary evidence be presented through summaries, tabulations, charts, extracts or samples	55	17
14. **Physical evidence other than documents**	56-59	17
(a) What arrangements should be made if physical evidence will be submitted	57	18
(b) What arrangements should be made if an on-site inspection is necessary	58-59	18
15. **Witnesses**	60-69	18
(a) Advance notice about a witness whom a party intends to present; written witnesses' statements	61-63	18

	Paragraphs	Page
(b) Manner of taking oral evidence of witnesses	64-66	19
(i) Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted	64	19
(ii) Whether oral testimony will be given under oath or affirmation and, if so, in what form an oath or affirmation should be made	65	19
(iii) May witnesses be in the hearing room when they are not testifying	66	19
(c) In which order will the witnesses be called	67	20
(d) Interviewing witnesses prior to their appearance at a hearing	68	20
(e) Hearing representatives of a party	69	20
16. **Experts and expert witnesses**	70-74	20
(a) Expert appointed by the arbitral tribunal	71-73	20
(i) The expert's terms of reference	72	20
(ii) The opportunity of the parties to comment on the expert's report, including by presenting expert testimony	73	21
(b) Expert opinion presented by a party (expert witness)	74	21
17. **Hearings**	75-86	21
(a) Decision whether to hold hearings	75-76	21
(b) Whether one period of hearings should be held or separate periods of hearings	77	21
(c) Setting dates for hearings	78	22
(d) Whether there should be a limit on the aggregate amount of time each party will have for oral arguments and questioning witnesses	79-80	22
(e) The order in which the parties will present their arguments and evidence	81	22
(f) Length of hearings	82	22
(g) Arrangements for a record of the hearings	83-84	23
(h) Whether and when the parties are permitted to submit notes summarizing their oral arguments	85-86	23
18. **Multi-party arbitration**	87-89	23
19. **Possible requirements concerning filing or delivering the award**	90-91	24
Who should take steps to fulfil any requirement	91	24

ANNOTATIONS

1. **Set of arbitration rules**

If the parties have not agreed on a set of arbitration rules, would they wish to do so

15. Sometimes parties who have not included in their arbitration agreement a stipulation that a set of arbitration rules will govern their arbitral proceedings might wish to do so after the arbitration has begun. If that occurs, the UNCITRAL Arbitration Rules may be used either without modification or with such modifications as the parties might wish to agree upon. In the alternative, the parties might wish to adopt the rules of an arbitral institution; in that case, it would be necessary to secure the agreement of that institution and to stipulate the terms under which the arbitration could be carried out in accordance with the rules of that institution.

16. However, caution is advised as consideration of a set of arbitration rules might delay the proceedings or give rise to unnecessary controversy.

17. It should be noted that agreement on arbitration rules is not a necessity and that, if the parties do not agree on a set of arbitration rules, the arbitral tribunal has the power to continue the proceedings and determine, on the basis of the law governing the arbitral procedure, how the case will be conducted.

2. **Language of proceedings**

18. Many rules and laws on arbitral procedure empower the arbitral tribunal to determine the language or languages to be used in the proceedings, if the parties have not reached an agreement thereon.

(a) Possible need for translation of documents, in full or in part

19. Some documents annexed to the statements of claim and defence or submitted later may not be in the language of the proceedings. It may be considered whether the arbitral tribunal should order that any of those documents or parts thereof should be accompanied by a translation into the language of the proceedings. Documents that, in the interest of economy, might not need to be translated, or may have to be translated only in part, are, for example, business records (e.g., invoices, transport documents, construction records) or texts concerning the law applicable to the substance of the dispute (e.g., statutes, court decisions or commentaries).

(b) Possible need for interpretation of oral presentations

20. If interpretation will be necessary during oral hearings, it is advisable to consider whether the arrangements should be the responsibility of a party or the arbitral tribunal. In an arbitration administered by an institution, interpretation as well as translation services are often arranged by the arbitral institution.

(c) Cost of translation and interpretation

21. In taking decisions about translation or interpretation, it is advisable to decide whether any or all of the costs are to be paid directly by a party or whether they will be paid out of the deposits and apportioned between the parties along with the other arbitration costs.

3. **Place of arbitration**

(a) Determination of the place of arbitration, if not already agreed upon by the parties

22. Arbitration rules usually allow the parties to agree on the place of arbitration, subject to the requirement of some arbitral institutions that arbitrations under their rules be conducted at a particular place, usually the location of the institution. If the place has not been so agreed upon, the rules governing the arbitration typically provide that it is in the power of the arbitral tribunal or the institution administering the arbitration to determine the place. If the arbitral tribunal is to make that determination, it may wish to hear the views of the parties before doing so.

23. Various factual and legal factors influence the choice of the place of arbitration, and their relative importance varies from case to case. Among the more prominent factors are: (a) suitability of the law on arbitral procedure of the place of arbitration; (b) whether there is a multilateral or bilateral treaty on enforcement of arbitral awards between the State where the arbitration takes place and the State or States where the award may have to be enforced; (c) convenience of the parties and the arbitrators, including the travel distances; (d) availability and cost of support services needed; (e) location of the subject-matter in dispute and proximity of evidence.

(b) Possibility of meetings outside the place of arbitration

24. Many sets of arbitration rules and laws on arbitral procedure expressly allow the arbitral tribunal to hold meetings elsewhere than at the place of arbitration. For example, under the UNCITRAL Model Law on International Commercial Arbitration "the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultations among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents" (art. 20(2)). The purpose of this discretion is to permit arbitral proceedings to be carried out in a manner that is most efficient and economical.

4. **Administrative services that may be needed for the arbitral tribunal to carry out its functions**

25. Various administrative services (e.g., hearing rooms or secretarial services) may need to be procured for the arbitral tribunal to be able to carry out its functions. When the parties have submitted the case to an arbitral institution, the institution will usually provide all or a good part of the required administrative support to the arbitral tribunal. When an arbitration administered by an arbitral institution takes place away from the seat of the institution, the institution may be able to arrange for administrative services to be obtained from another

source, often an arbitral institution; some arbitral institutions have entered into cooperation agreements with a view to providing mutual assistance in servicing arbitral proceedings.

26. When the case is not administered by an institution, or the involvement of the institution does not include providing administrative support, usually the administrative arrangements for the proceedings will be made by the arbitral tribunal or the presiding arbitrator; it may also be acceptable to leave some of the arrangements to the parties, or to one of the parties subject to agreement of the other party or parties. Even in such cases, a convenient source of administrative support might be found in arbitral institutions, which often offer their facilities to arbitrations not governed by the rules of the institution. Otherwise, some services could be procured from entities such as chambers of commerce, hotels or specialized firms providing secretarial or other support services.

27. Administrative services might be secured by engaging a secretary of the arbitral tribunal (also referred to as registrar, clerk, administrator or rapporteur), who carries out the tasks under the direction of the arbitral tribunal. Some arbitral institutions routinely assign such persons to the cases administered by them. In arbitrations not administered by an institution or where the arbitral institution does not appoint a secretary, some arbitrators frequently engage such persons, at least in certain types of cases, whereas many others normally conduct the proceedings without them.

28. To the extent the tasks of the secretary are purely organizational (e.g., obtaining meeting rooms and providing or coordinating secretarial services), this is usually not controversial. Differences in views, however, may arise if the tasks include legal research and other professional assistance to the arbitral tribunal (e.g., collecting case law or published commentaries on legal issues defined by the arbitral tribunal, preparing summaries from case law and publications, and sometimes also preparing drafts of procedural decisions or drafts of certain parts of the award, in particular those concerning the facts of the case). Views or expectations may differ especially where a task of the secretary is similar to professional functions of the arbitrators. Such a role of the secretary is in the view of some commentators inappropriate or is appropriate only under certain conditions, such as that the parties agree thereto.

5. **Deposits in respect of costs**

(a) Amount to be deposited

29. In an arbitration administered by an institution, the institution often sets, on the basis of an estimate of the costs of the proceedings, the amount to be deposited as an advance for the costs of the arbitration. In other cases it is customary for the arbitral tribunal to make such an estimate and request a deposit. The estimate typically includes travel and other expenses by the arbitrators, expenditures for administrative assistance required by the arbitral tribunal, costs of any expert advice required by the arbitral tribunal, and the fees for the arbitrators. Many arbitration rules have provisions on this matter, including on whether the deposit should be made by the two parties (or all parties in a multi-party case) or only by the claimant.

(b) Management of deposits

30. When the arbitration is administered by an institution, the institution's services may include managing and accounting for the deposited money. Where that is not the case, it might be useful to clarify matters such as the type and location of the account in which the money will be kept and how the deposits will be managed.

(c) Supplementary deposits

31. If during the course of proceedings it emerges that the costs will be higher than anticipated, supplementary deposits may be required (e.g., because the arbitral tribunal decides pursuant to the arbitration rules to appoint an expert).

6. Confidentiality of information relating to the arbitration; possible agreement thereon

32. It is widely viewed that confidentiality is one of the essential and helpful features of arbitration. Nevertheless, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. While arbitration rules seldom contain comprehensive provisions on confidentiality, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.

33. An agreement on confidentiality might cover, for example, one or more of the following matters: the material or information that is to be kept confidential (e.g., pieces of evidence, written and oral arguments, the fact that the arbitration is taking place, identity of the arbitrators, content of the award); measures for maintaining confidentiality of such information and hearings; whether any special procedures should be employed for maintaining the confidentiality of information transmitted by electronic means (e.g., because communication equipment is shared by several users, or because electronic mail over public networks is considered not sufficiently protected against unauthorized access); circumstances in which confidential information may be disclosed in part or in whole, (e.g., in the context of disclosures of information in the public domain, or if required by law or a regulatory body).

7. Routing of written communications among the parties and the arbitrators

34. To the extent the question how documents and other written communications should be routed among the parties and the arbitrators is not settled by the agreed rules, or, if an institution administers the case, by the practices of the institution, it is useful for the arbitral tribunal to clarify the question suitably early so as to avoid misunderstandings and delays.

35. Among various possible patterns of routing, one example is that a party transmits the appropriate number of copies to the arbitral tribunal, or to the arbitral institution, if one is involved, which then forwards them as appropriate. Another example is that a party is to send copies simultaneously to the arbitrators and the other party or parties. Documents and other written communications directed by the arbitral tribunal or the presiding arbitrator to

one or more parties may also follow a determined pattern, such as through the arbitral institution or by direct transmission. For some communications, in particular those on organizational matters, (e.g., dates for hearings) more direct routes of communication may be agreed, even if, for example, the arbitral institution acts as an intermediary for documents such as the statements of claim and defence, evidence or written arguments.

8. **Telefax and other electronic means of sending documents**

(a) Telefax

36. While telefax offers many advantages over traditional means of communication, it is advisable to consider whether the equipment used offers satisfactory security as regards, for example, the possibility to verify the source of a message or to discover a distortion in a message. In light of those considerations, it might be decided that certain types of documents (e.g., written pieces of evidence) should not be sent by telefax or that certain telefax messages should be confirmed by mailing or otherwise delivering the documents whose facsimile was transmitted by electronic means. Nevertheless, to avoid rigidity when certain documents should not be sent by telefax, it may be appropriate for the arbitral tribunal to retain discretion to accept an advance copy of a document by telefax for the purposes of meeting a deadline, provided the document itself is received within a reasonable time thereafter.

(b) Other electronic means (e.g., electronic mail, magnetic or optical disk)

37. It might be agreed that documents, or some of them, will be exchanged not only in paper-based form, but in addition also in an electronic form other than telefax (e.g., as electronic mail, or on a magnetic or optical disk), or only in electronic form. Since the use of electronic means depends on the aptitude of the persons involved and the availability of equipment and computer programs, agreement is necessary for such means to be used. If both paper-based and electronic means are to be used, it is advisable to decide which one is controlling and, if there is a time-limit for submitting a document, which act constitutes submission.

38. When the exchange of documents in electronic form is planned, it is useful, in order to avoid technical difficulties, to agree on matters such as: data carriers (e.g., computer disks or electronic mail) and their technical characteristics; computer programs to be used in preparing the electronic records; instructions for transforming the electronic records into human-readable form; keeping of logs and back-up records of communications sent and received; information in human-readable form that should accompany the disks (e.g., the names of the originator and recipient, computer program, titles of the electronic files, and the back-up methods used); procedures when a message is lost or the communication system otherwise fails; and identifying persons who can be contacted if a problem occurs.

9. **Arrangements for the exchange of written submissions**

39. After the parties have initially stated their claims and defences, they may wish, or the arbitral tribunal might request them, to present further written submissions so as to prepare for the hearings or to provide the basis for a decision without hearings. In such submissions, the parties, for example, present or comment on allegations and evidence, cite or explain law, or make or react to proposals. In practice such submissions are referred to variously as, for example, statement, memorial, counter-memorial, brief, counter-brief, reply, réplique, duplique, rebuttal, rejoinder; the terminology is a matter of linguistic usage and the scope or sequence of the submission.

(a) Scheduling of written submissions

40. It is advisable that the arbitral tribunal set time-limits for written submissions. In enforcing the time-limits, the arbitral tribunal may wish, on the one hand, to make sure that the case is not unduly protracted and, on the other hand, to reserve a degree of discretion and allow late submissions if appropriate under the circumstances. In some cases the arbitral tribunal might prefer not to plan the written submissions in advance, thus leaving such matters, including time-limits, to be decided in light of the developments in the proceedings. In other cases, the arbitral tribunal may wish to determine, when scheduling the first written submissions, the number of subsequent submissions.

41. Practices differ as to whether, after the hearings have been held, written submissions are still acceptable. While some arbitral tribunals consider post-hearing submissions unacceptable, others might request or allow them on a particular issue. Some arbitral tribunals follow the procedure according to which the parties are not requested to present written evidence and legal arguments to the arbitral tribunal before the hearings; in such a case, the arbitral tribunal may regard it as appropriate that written submission be made after the hearings.

(b) Consecutive or simultaneous submissions

42. Written submissions on an issue may be made consecutively, i.e., the party who receives a submission is given a period of time to react with its counter-submission. Another possibility is to request each party to make the submission within the same time period to the arbitral tribunal or the institution administering the case; the received submissions are then forwarded simultaneously to the respective other party or parties. The approach used may depend on the type of issues to be commented upon and the time in which the views should be clarified. With consecutive submissions, it may take longer than with simultaneous ones to obtain views of the parties on a given issue. Consecutive submissions, however, allow the reacting party to comment on all points raised by the other party or parties, which simultaneous submissions do not; thus, simultaneous submissions might possibly necessitate further submissions.

10. Practical details concerning written submissions and evidence (e.g., copies, numbering of items of evidence, references to documents, numbering of paragraphs)

43. Depending on the volume and kind of documents to be handled, it might be considered whether practical arrangements on details such as the following would be helpful:

- number of copies in which each document is to be submitted;
- a system for numbering items of evidence, and a method for marking them, including by tabs;
- form for references to documents (e.g., by the heading and the number assigned to the document or its date);
- paragraph numbering in written submissions, in order to facilitate precise references to parts of a text;
- inclusion of translations in the same volume as original texts or in separate volumes.

11. Defining points at issue; order of deciding issues; defining relief or remedy sought

(a) Should a list of points at issue be prepared

44. In considering the parties' allegations and arguments, the arbitral tribunal may come to the conclusion that it would be useful for it or for the parties to prepare, for analytical purposes and for ease of discussion, a list of the points at issue, as opposed to those that are undisputed. If the arbitral tribunal determines that the advantages of working on the basis of such a list outweigh the disadvantages (such as delay and possible adverse effect on the flexibility of the proceedings), it chooses the appropriate stage of the proceedings for preparing a list, bearing in mind also that subsequent developments in the proceedings may require a revision of the points at issue. Such an identification of points at issue might help to concentrate on the essential matters, to reduce the number of points at issue by agreement of the parties, and to select the best and most economical process for resolving the dispute.

(b) In which order should the points at issue be decided

45. While it is often appropriate to deal with all the points at issue collectively, the arbitral tribunal might decide to take them up during the proceedings in a particular order. The order may be due to a point being preliminary relative to another (e.g., a decision on the jurisdiction of the arbitral tribunal is preliminary to consideration of substantive issues, or the issue of responsibility for a breach of contract is preliminary to the issue of the resulting damages). A particular order may be decided also when the breach of various contracts is in dispute or when damages arising from various events are claimed.

46. If the arbitral tribunal has adopted a particular order of deciding points at issue, it might consider it appropriate to issue a decision on one of the points earlier than on the other ones. This might be done, for example, when a discrete part of a claim is ready for decision while the other parts still require extensive consideration, or when it is expected that after deciding certain issues the parties might be more inclined to settle the remaining ones. Such earlier

decisions are referred to by expressions such as "partial", "interlocutory" or "interim" awards or decisions, depending on the type of issue dealt with and on whether the decision is final with respect to the issue it resolves. Questions that might be the subject of such decisions are, for example, jurisdiction of the arbitral tribunal, interim measures of protection, or the liability of the defendant.

(c) Is there a need to define more precisely the relief or remedy sought

47. If the arbitral tribunal considers that the relief or remedy sought is insufficiently definite, it may wish to explain to the parties the degree of definiteness with which their claims should be formulated. Such an explanation may be useful since criteria are not uniform as to how specific the claimant must be in formulating a relief or remedy.

12. Possible settlement negotiations and their effect on scheduling proceedings

48. Attitudes differ as to whether it is appropriate for the arbitral tribunal to bring up the possibility of settlement. Having regard to the divergence of practices in this regard, the arbitral tribunal should only suggest settlement negotiations with caution. However, it may be opportune for the arbitral tribunal to schedule the proceedings in a way that might facilitate the continuation or initiation of settlement negotiations.

13. Documentary evidence

(a) Time-limits for submission of documentary evidence intended to be submitted by the parties; consequences of late submission

49. Often the written submissions of the parties contain sufficient information for the arbitral tribunal to fix the time-limit for submitting evidence. Otherwise, in order to set realistic time periods, the arbitral tribunal may wish to consult with the parties about the time that they would reasonably need.

50. The arbitral tribunal may wish to clarify that evidence submitted late will as a rule not be accepted. It may wish not to preclude itself from accepting a late submission of evidence if the party shows sufficient cause for the delay.

(b) Whether the arbitral tribunal intends to require a party to produce documentary evidence

51. Procedures and practices differ widely as to the conditions under which the arbitral tribunal may require a party to produce documents. Therefore, the arbitral tribunal might consider it useful, when the agreed arbitration rules do not provide specific conditions, to clarify to the parties the manner in which it intends to proceed.

52. The arbitral tribunal may wish to establish time-limits for the production of documents. The parties might be reminded that, if the requested party duly invited to produce documentary evidence fails to do so within the established period of time, without showing

sufficient cause for such failure, the arbitral tribunal is free to draw its conclusions from the failure and may make the award on the evidence before it.

(c) Should assertions about the origin and receipt of documents and about the correctness of photocopies be assumed as accurate

53. It may be helpful for the arbitral tribunal to inform the parties that it intends to conduct the proceedings on the basis that, unless a party raises an objection to any of the following conclusions within a specified period of time: (a) a document is accepted as having originated from the source indicated in the document, (b) a copy of a dispatched communication (e.g., letter, telex, telefax) is accepted without further proof as having been received by the addressee, and (c) a photocopy is accepted as correct. A statement by the arbitral tribunal to that effect can simplify the introduction of documentary evidence and discourage unfounded and dilatory objections, at a late stage of the proceedings, to the probative value of documents. It is advisable to provide that the time-limit for objections will not be enforced if the arbitral tribunal considers the delay justified.

(d) Are the parties willing to submit jointly a single set of documentary evidence

54. The parties may consider submitting jointly a single set of documentary evidence whose authenticity is not disputed. The purpose would be to avoid duplicate submissions and unnecessary discussions concerning the authenticity of documents, without prejudicing the position of the parties concerning the content of the documents. Additional documents may be inserted later if the parties agree. When a single set of documents would be too voluminous to be easily manageable, it might be practical to select a number of frequently used documents and establish a set of "working" documents. A convenient arrangement of documents in the set may be according to chronological order or subject-matter. It is useful to keep a table of contents of the documents, for example by their short headings and dates, and to provide that the parties will refer to documents by those headings and dates.

(e) Should voluminous and complicated documentary evidence be presented through summaries, tabulations, charts, extracts or samples

55. When documentary evidence is voluminous and complicated, it may save time and costs if such evidence is presented by a report of a person competent in the relevant field (e.g., public accountant or consulting engineer). The report may present findings in the form of summaries, tabulations, charts, extracts or samples. Such presentation of evidence should be combined with arrangements that give the interested party the opportunity to review the underlying data and the methodology of preparing the report.

14. Physical evidence other than documents

56. In some arbitrations the arbitral tribunal is called upon to assess physical evidence other than documents, for example, by inspecting samples of goods, viewing a video recording or observing the functioning of a machine.

(a) What arrangements should be made if physical evidence will be submitted

57. If physical evidence will be submitted, the arbitral tribunal may wish to fix the time schedule for presenting the evidence, make arrangements for the other party or parties to have a suitable opportunity to prepare itself for the presentation of the evidence, and possibly take measures for safekeeping the items of evidence.

(b) What arrangements should be made if an on-site inspection is necessary

58. If an on-site inspection of property or goods will take place, the arbitral tribunal may consider matters such as timing, meeting places and the need to avoid communications between arbitrators and a party about points at issue without the presence of the other party or parties.

59. The site to be inspected is often under the control of one of the parties, which typically means that employees or representatives of that party will be present to give guidance and explanations. It should be borne in mind that statements of those representatives or employees made during an on-site inspection, as contrasted with statements those persons might make as witnesses in a hearing, should not be treated as evidence in the proceedings.

15. Witnesses

60. While laws and rules on arbitral procedure typically leave broad freedom concerning the manner of taking evidence of witnesses, practices on procedural points are varied. In order to facilitate the preparations of the parties for the hearings, the arbitral tribunal may consider it appropriate to clarify, in advance of the hearings, some or all of the following issues.

(a) Advance notice about a witness whom a party intends to present; written witnesses' statements

61. To the extent the applicable arbitration rules do not deal with the matter, the arbitral tribunal may wish to require that each party give advance notice to the arbitral tribunal and the other party or parties of any witness it intends to present. As to the content of the notice, the following is an example of what might be required, in addition to the names and addresses of the witnesses: (a) the subject upon which the witnesses will testify; (b) the language in which the witnesses will testify; (c) the nature of the relationship with any of the parties, qualifications and experience of the witnesses if and to the extent these are relevant to the dispute or the testimony, and how the witnesses learned about the facts on which they will testify. However, it may not be necessary to require such a notice, in particular if the thrust of the testimony can be clearly ascertained from the party's allegations.

62. Some practitioners favour the procedure according to which the party presenting witness evidence submits a signed witness's statement containing testimony itself. It should be noted, however, that such practice, which imply interviewing the witness by the party presenting the testimony, is not known in all parts of the world and, moreover, that some practitioners disapprove of it on the ground that such contacts between the party and the witness may compromise the credibility of the testimony and are therefore improper (see below, para. 68). Notwithstanding these reservations, signed witness's testimony has advantages in that it may expedite the proceedings by making it easier for the other party or parties to prepare for the

hearings or for the parties to identify uncontested matters. However, those advantages might be outweighed by the time and expense involved in obtaining the written testimony.

63. If a signed witness's statement should be made under oath or similar affirmation of truthfulness, it may be necessary to clarify by whom the oath or affirmation should be administered and whether any formal authentication will be required by the arbitral tribunal.

(b) Manner of taking oral evidence of witnesses

(i) Order in which questions will be asked and the manner in which the hearing of witnesses will be conducted

64. To the extent that the applicable rules do not provide an answer, it may be useful for the arbitral tribunal to clarify how witnesses will be heard. One of the various possibilities is that a witness is first questioned by the arbitral tribunal, whereupon questions are asked by the parties, first by the party who called the witness. Another possibility is for the witness to be questioned by the party presenting the witness and then by the other party or parties, while the arbitral tribunal might pose questions during the questioning or after the parties on points that in the tribunal's view have not been sufficiently clarified. Differences exist also as to the degree of control the arbitral tribunal exercises over the hearing of witnesses. For example, some arbitrators prefer to permit the parties to pose questions freely and directly to the witness, but may disallow a question if a party objects; other arbitrators tend to exercise more control and may disallow a question on their initiative or even require that questions from the parties be asked through the arbitral tribunal.

(ii) Whether oral testimony will be given under oath or affirmation and, if so, in what form an oath or affirmation should be made

65. Practices and laws differ as to whether or not oral testimony is to be given under oath or affirmation. In some legal systems, the arbitrators are empowered to put witnesses on oath, but it is usually in their discretion whether they want to do so. In other systems, oral testimony under oath is either unknown or may even be considered improper as only an official such as a judge or notary may have the authority to administer oaths.

(iii) May witnesses be in the hearing room when they are not testifying

66. Some arbitrators favour the procedure that, except if the circumstances suggest otherwise, the presence of a witness in the hearing room is limited to the time the witness is testifying; the purpose is to prevent the witness from being influenced by what is said in the hearing room, or to prevent that the presence of the witness would influence another witness. Other arbitrators consider that the presence of a witness during the testimony of other witnesses may be beneficial in that possible contradictions may be readily clarified or that their presence may act as a deterrent against untrue statements. Other possible approaches may be that witnesses are not present in the hearing room before their testimony, but stay in the room after they have testified, or that the arbitral tribunal decides the question for each witness individually depending what the arbitral tribunal considers most appropriate. The arbitral tribunal may leave the procedure to be decided during the hearings, or may give guidance on the question in advance of the hearings.

(c) In which order will the witnesses be called

67. When several witnesses are to be heard and longer testimony is expected, it is likely to reduce costs if the order in which they will be called is known in advance and their presence can be scheduled accordingly. Each party might be invited to suggest the order in which it intends to present the witnesses, while it would be up to the arbitral tribunal to approve the scheduling and to make departures from it.

(d) Interviewing witnesses prior to their appearance at a hearing

68. In some legal systems, parties or their representatives are permitted to interview witnesses, prior to their appearance at the hearing, as to such matters as their recollection of the relevant events, their experience, qualifications or relation with a participant in the proceedings. In other systems such contacts with witnesses are considered improper. In order to avoid misunderstandings, the arbitral tribunal may consider it useful to clarify what kind of contacts a party is permitted to have with a witness in the preparations for the hearings.

(e) Hearing representatives of a party

69. According to some legal systems, certain persons affiliated with a party may only be heard as representatives of the party but not as witnesses. In such a case, it may be necessary to consider ground rules for determining which persons may not testify as witnesses (e.g., certain executives, employees or agents) and for hearing statements of those persons and for questioning them.

16. **Experts and expert witnesses**

70. Many arbitration rules and laws on arbitral procedure address the participation of experts in arbitral proceedings. A frequent solution is that the arbitral tribunal has the power to appoint an expert to report on issues determined by the tribunal; in addition, the parties may be permitted to present expert witnesses on points at issue. In other cases, it is for the parties to present expert testimony, and it is not expected that the arbitral tribunal will appoint an expert.

(a) Expert appointed by the arbitral tribunal

71. If the arbitral tribunal is empowered to appoint an expert, one possible approach is for the tribunal to proceed directly to selecting the expert. Another possibility is to consult the parties as to who should be the expert; this may be done, for example, without mentioning a candidate, by presenting to the parties a list of candidates, soliciting proposals from the parties, or by discussing with the parties the "profile" of the expert the arbitral tribunal intends to appoint, i.e. the qualifications, experience and abilities of the expert.

(i) The expert's terms of reference

72. The purpose of the expert's terms of reference is to indicate the questions on which the expert is to provide clarification, to avoid opinions on points that are not for the expert to assess and to commit the expert to a time-schedule. While the discretion to appoint an expert

normally includes the determination of the expert's terms of reference, the arbitral tribunal may decide to consult the parties before finalizing the terms. In order to facilitate the evaluation of the expert's report, it is advisable to require the expert to include in the report information on the method used in arriving at the conclusions and the evidence and information used in preparing the report.

(ii) The opportunity of the parties to comment on the expert's report, including by presenting expert testimony

73. Arbitration rules that contain provisions on experts usually also have provisions on the right of a party to comment on the report of the expert appointed by the arbitral tribunal. If no such provisions apply or more specific procedures than those prescribed are deemed necessary, the arbitral tribunal may, in light of those provisions, consider it opportune to determine, for example, the time period for presenting written comments of the parties, or, if hearings are to be held for the purpose of hearing the expert, the procedures for interrogating the expert by the parties or for the participation of any expert witnesses presented by the parties.

(b) Expert opinion presented by a party (expert witness)

74. If a party presents an expert opinion, the arbitral tribunal might consider requiring, for example, that the opinion be in writing, that the expert should be available to answer questions at hearings, and that, if a party will present an expert witness at a hearing, advance notice must be given or that the written opinion must be presented in advance, as in the case of other witnesses (see above, paragraphs 61-63).

17. **Hearings**

(a) Decision whether to hold hearings

75. Laws on arbitral procedure and arbitration rules often have provisions as to the cases in which oral hearings must be held and as to when the arbitral tribunal has discretion to decide whether to hold hearings.

76. If it is up to the arbitral tribunal to decide whether to hold hearings, the decision is likely to be influenced by factors such as, on the one hand, that it is usually quicker and easier to clarify points at issue pursuant to a direct confrontation of arguments than on the basis of correspondence and, on the other hand, the travel and other cost of holding hearings, and that the need of finding acceptable dates for the hearings might delay the proceedings.

(b) Whether one period of hearings should be held or separate periods of hearings

77. Attitudes vary as to whether hearings should be held in a single period of hearings or in separate periods, especially when more than a few days are needed to complete the hearings. According to some arbitrators, the entire hearings should normally be held in a single period, even if the hearings are to last for more than a week. Other arbitrators in such cases tend to schedule separate periods of hearings. In some cases issues to be decided are separated, and separate hearings set for those issues, with the aim that oral presentation on those issues will be completed within the allotted time. Among the advantages of one period of hearings are

that it involves less travel costs, memory will not fade, and it is unlikely that people representing a party will change. On the other hand, the longer the hearings, the more difficult it may be to find early dates acceptable to all participants. Furthermore, separate periods of hearings may be easier to schedule, the subsequent hearings may be tailored to the development of the case, and the period between the hearings leaves time for analysing the records and negotiations between the parties aimed at narrowing the points at issue by agreement.

(c) Setting dates for hearings

78. Typically, firm dates will be fixed for hearings. Exceptionally, the arbitral tribunal may initially wish to set only "target dates" as opposed to definitive dates. This may be done at a stage of the proceedings when not all information necessary to schedule hearings is yet available, with the understanding that the target dates will either be confirmed or rescheduled within a reasonably short period. Such provisional planning can be useful to participants who are generally not available on short notice.

(d) Whether there should be a limit on the aggregate amount of time each party will have for oral arguments and questioning witnesses

79. Some arbitrators consider it useful to limit the aggregate amount of time each party has for any of the following: (a) making oral statements, (b) questioning its witnesses, and (c) questioning the witnesses of the other party or parties. In general, the same aggregate amount of time is considered appropriate for each party, unless the arbitral tribunal considers that a different allocation is justified. Before deciding, the arbitral tribunal may wish to consult the parties as to how much time they think they will need.

80. Such planning of time, provided it is realistic, fair and subject to judiciously firm control by the arbitral tribunal, will make it easier for the parties to plan the presentation of the various items of evidence and arguments, reduce the likelihood of running out of time towards the end of the hearings, and avoid that one party would unfairly use up a disproportionate amount of time.

(e) The order in which the parties will present their arguments and evidence

81. Arbitration rules typically give broad latitude to the arbitral tribunal to determine the order of presentations at the hearings. Within that latitude, practices differ, for example, as to whether opening or closing statements are heard and their level of detail; the sequence in which the claimant and the defendant present their opening statements, arguments, witnesses and other evidence; and whether the defendant or the claimant has the last word. In view of such differences, it may foster efficiency of the proceedings if the arbitral tribunal clarifies to the parties, in advance of the hearings, the manner in which it will conduct the hearings, at least in broad lines.

(f) Length of hearings

82. The length of a hearing primarily depends on the complexity of the issues to be argued and the amount of witness evidence to be presented. The length also depends on the procedural style used in the arbitration. Some practitioners prefer to have written evidence and written arguments presented before the hearings, which thus can focus on the issues that

have not been sufficiently clarified. Those practitioners generally tend to plan shorter hearings than those practitioners who prefer that most if not all evidence and arguments are presented to the arbitral tribunal orally and in full detail. In order to facilitate the parties' preparations and avoid misunderstandings, the arbitral tribunal may wish to clarify to the parties, in advance of the hearings, the intended use of time and style of work at the hearings.

(g) Arrangements for a record of the hearings

83. The arbitral tribunal should decide, possibly after consulting with the parties, on the method of preparing a record of oral statements and testimony during hearings. Among different possibilities, one is that the members of the arbitral tribunal take personal notes. Another is that the presiding arbitrator during the hearing dictates to a typist a summary of oral statements and testimony. A further method, possible when a secretary of the arbitral tribunal has been appointed, may be to leave to that person the preparation of a summary record. A useful, though costly, method is for professional stenographers to prepare verbatim transcripts, often within the next day or a similarly short time period. A written record may be combined with tape-recording, so as to enable reference to the tape in case of a disagreement over the written record.

84. If transcripts are to be produced, it may be considered how the persons who made the statements will be given an opportunity to check the transcripts. For example, it may be determined that the changes to the record would be approved by the parties or, failing their agreement, would be referred for decision to the arbitral tribunal.

(h) Whether and when the parties are permitted to submit notes summarizing their oral arguments

85. Some legal counsel are accustomed to giving notes summarizing their oral arguments to the arbitral tribunal and to the other party or parties. If such notes are presented, this is usually done during the hearings or shortly thereafter; in some cases, the notes are sent before the hearing. In order to avoid surprise, foster equal treatment of the parties and facilitate preparations for the hearings, advance clarification is advisable as to whether submitting such notes is acceptable and the time for doing so.

86. In closing the hearings, the arbitral tribunal will normally assume that no further proof is to be offered or submission to be made. Therefore, if notes are to be presented to be read after the closure of the hearings, the arbitral tribunal may find it worthwhile to stress that the notes should be limited to summarizing what was said orally and in particular should not refer to new evidence or new argument.

[The following item 18 forms part of variant 2 as indicated above in paragraph 7]

18. **Multi-party arbitration**

87. When a single arbitration involves more than two parties (multi-party arbitration), considerations regarding the need to organize arbitral proceedings, and matters that may be considered in that connection, are generally not different from two-party arbitrations. A possible difference may be that, because of the need to deal with more than two parties, multi-party proceedings can be more complicated to manage than bilateral proceedings.

88. The areas of possibly increased complexity are, for example, the flow of communications among the parties and the arbitral tribunal (above, paras. 34, 35 and 39 to 42); if points at issue are to be decided at different points in time, the order of deciding them (paras. 45 and 46); the manner in which the parties will participate in hearing witnesses (para. 64); appointment of experts and the participation of the parties in considering their reports (paras. 71 to 73); the scheduling of hearings (para. 77); the order in which the parties will present their arguments and evidence at hearings (para. 81).

89. The Notes, limited to pointing out matters that may be considered in organizing arbitral proceedings in general, do not discuss the drafting of the arbitration agreement or the constitution of the arbitral tribunal, both issues that give rise to special questions as compared to two-party arbitration. Thus, the Notes, notwithstanding a possible greater complexity of multi-party arbitration, can be used in two-party as well as multi-party proceedings.

19. **Possible requirements concerning filing or delivering the award**

90. Some national laws require that arbitral awards be filed or registered with a court or similar authority, or that they be delivered in a particular manner or through a particular authority. Those laws differ with respect to, for example, the type of award to which the requirement applies (e.g., to all awards or only to awards not rendered under the auspices of an arbitral institution); time periods for filing, registering or delivering the award (in some cases those time periods may be rather short); or consequences for failing to comply with the requirement (which might be, e.g., invalidity of the award or inability to enforce it in a particular manner).

Who should take steps to fulfil any requirement

91. If such a requirement exists, it is useful, some time before the award is to be issued, to plan who should take the necessary steps to meet the requirement and how the costs are to be borne.

* * *

UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/424
19 April 1996

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Twenty-ninth session
New York, 28 May - 14 June 1996

POSSIBLE FUTURE WORK

Build-Operate-Transfer projects

Note by the Secretariat

Contents

		Paragraphs	Page
INTRODUCTION		1-3	3
I.	THE BUILD-OPERATE-TRANSFER CONCEPT	4-10	3
II.	WORK OF OTHER ORGANIZATIONS	11-21	5
	A. United Nations Industrial Development Organization	11-16	5
	B. Economic Commission for Europe	17-18	6
	C. The World Bank	19	7
	D. European Bank for Reconstruction and Development	20	7
	E. International Federation of Consulting Engineers	21	7
III.	THE ROLE OF AN ADEQUATE LEGAL FRAMEWORK	22-29	8
	A. Promoting the confidence of foreign investors	22-23	8
	B. Areas of legislation relevant to BOT projects	24-26	8
	C. Existing approaches to BOT-related legislation	27-29	9
IV.	OUTLINE OF MATTERS COVERED BY NATIONAL LEGISLATION	30-89	9
	A. General provisions	31-37	10
	1. Fields of concession	31	10
	2. Statements of policy	32	10
	3. Competent governmental body	33-34	10

V.96-82298

		Paragraphs	Page
	4. Planning and coordination	35-36	10
	5. Publicity and confidentiality	37	11
B.	Award of the concession	38-52	11
	1. Prerequisites and conditions	38-39	11
	2. Preferences to domestic entities	40-41	12
	3. Selection of the concessionaire	42-47	12
	4. Selection of subcontractors	48-49	13
	5. The project agreement	50-52	13
C.	Rights and obligations of the concessionaire	53-59	14
	1. Nature of the concession	53	14
	2. Obligations	54	14
	3. Ancillary revenue sources	55-56	14
	4. Assignment, subconcession, encumbrances	57-59	15
D.	Governmental obligations and undertakings	60-63	15
	1. Financial incentives and guarantees	60-61	15
	2. Assurances	62	16
	3. Taxation	63	16
E.	Operation of the concession	64-68	16
	1. Price setting and price increases	64-66	16
	2. Monitoring of project implementation	67-68	17
F.	Relations with customers	69	18
G.	Relations with competitors	70	18
H.	Performance by the concessionaire	71-75	18
	1. Breach of the agreement	71-74	18
	2. Impediment	75	19
I.	Termination of concession	76-81	19
	1. Common grounds for termination	76-77	19
	2. Extension	78	19
	3. Transfer of the facility to the Government	79-81	19
J.	Miscellaneous provisions	82-84	20
	1. Governing law	82-83	20
	2. Settlement of disputes	84	20
V.	CONCLUSION	85-92	21

INTRODUCTION

1. At the twenty-seventh session in 1994, the Commission, after consideration of a note prepared by the Secretariat (A/CN.9/399), emphasized the relevance of build-operate-transfer projects (BOT) and requested the Secretariat to prepare a note on possible future work on the subject of BOT projects. The Commission discussed the requested note (A/CN.9/414) at its twenty-eighth session in 1995.1/

2. Wide support was voiced in the Commission for taking up work in the area of BOT. It was pointed out that the BOT project-financing mechanism had raised a considerable amount of interest in many States and that work by the Commission in that area would help such States in tackling the problems that had been identified. It was noted, however, that, since the work to be undertaken by the Commission would be partly influenced by the final content of the Guidelines to be prepared by the United Nations Industrial Development Organization (UNIDO), and taking into account that the practice regarding BOT was still developing, it would be useful to provide the Secretariat with the opportunity to study further the issues proposed for future work. It was also noted that the Commission's work would be tailored so as not to duplicate work carried out by UNIDO on BOT projects. The Commission requested the Secretariat to prepare a report on the issues proposed for future work with a view to facilitating discussion of the matter at the Commission's twenty-ninth session in 1996.

3. The present report is submitted pursuant to the above-mentioned request.

I. THE BUILD-OPERATE-TRANSFER CONCEPT

4. BOT is essentially a form of project financing whereby a Government awards to a group of investors (hereafter referred to as "project consortium") a concession for the development, operation, management and commercial exploitation of a particular project. The project consortium, or a company established by the project consortium (hereafter referred to as "concessionaire"), in turn, undertakes to develop the project and operate the concession in accordance with the agreement between the Government and the concessionaire (hereafter referred to as "project agreement"). While the generic term used for this type of project is "build-operate-transfer" (BOT), the following expressions may also be used to describe this form of project financing: "build-own-operate"(BOO),"build-own-operate-transfer" (BOOT),"build-own-lease-transfer" (BOLT) and "build-rent-transfer" (BRT). Despite the varying denomination, all these different arrangements consist of project financing schemes by which a Government grants a concession to private entities undertaking to finance, carry out and manage a particular project. Similar arrangements are sometimes also used between a private licensor and a project developer.

5. Unlike the traditional project financing structure in which the owner (the Government) assumes responsibility for obtaining financing and guaranteeing its repayment, in BOT it is the project consortium that assumes such responsibilities. The loans are made against the project's anticipated proceeds. This provides many benefits to the host Government. Since direct funds from the public budget are not required, the project will have little impact on public debt. Private

---

1/ Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), paras. 394-400.

sector financing also generally allows for the transfer of the financial, industrial and other risks to the private sector. Furthermore, since the project is built and, during the concession period, operated by the project consortium, the host Government benefits from private sector expertise in operating and managing such projects.

6. Contracts for the construction of infrastructure or other works traditionally provide that the owner takes over the facility upon completion of construction in accordance with the construction contract. The financing is arranged by the owner who pays the contractors either by drawing money from a loan or with its own resources. In such contracts, the contractor's basic duty is to build and to equip the contracted facility, while the economic viability and profitability of the project are the concern of the owner. In a BOT project, however, the project consortium undertakes to complete a construction and to operate the facility for a certain period of time with a view to recouping its costs and gaining profit. Thus, the project consortium has a clear interest in the feasibility and design of the facility. The project consortium also has an interest in ensuring that the legal and commercial conditions for construction and profitable operation of the facility are in place and will remain basically unchanged throughout the period of the concession.

7. Chief among the factors that have led to the interest in BOT projects is the potential for mobilizing private sector resources for infrastructure development without the need for raising public debt. This element of the BOT concept is particularly attractive at a time of worldwide increase in privatization of various utilities and services previously reserved for the public sector, and decreasing availability of public sector funds for infrastructure development. Other advantages include increased private sector involvement in the management of public infrastructure, higher potential for direct foreign investment, and access to technologies and skills not available locally. Also, BOT facilities may serve as a parameter for measuring the performance of similar projects run by the public sector.

8. There are, however, several features of BOT projects that have resulted in difficulties in their conclusion. A BOT project normally involves many contractually interrelated parties. Besides the host Government and the project consortium, other parties usually include lenders, construction companies, equipment suppliers, independent capital investors and the purchasers or end users of the project's product. Often, the project consortium will itself consist of construction companies, engineering equipment suppliers and other private investors and the project operator. Investors can include institutional investors and multilateral development agencies. In addition to that, complicated financing arrangements are necessary, not only because of the large number of parties involved, but also because, with no sovereign guarantees provided, the project consortium and the lenders have to find the means to cover the attendant risks including by way of insurance and various forms of guarantees. The contractual arrangements and risk allocation schemes in BOT can therefore be quite complex and require lengthy negotiations.

9. The support of the host Government is regarded as an essential factor for the successful realization of a BOT project. The host Government not only has to authorize the project but also will be the ultimate owner of the facility. The Government has to oversee the implementation of the concession and may, sometimes, share some of the debt or participate in the investment. In order to ensure long term private sector participation, the Government has to ensure a legal climate that is conducive to long term private investment. This will range from the establishment of a

legal framework for private investments to putting in place the necessary administrative machinery for the timely, fair and objective issuance of any required approvals or licences.

10. As the potential for BOT is more widely understood, interest in the use of the BOT concept of project finance is likely to increase, not only for large infrastructure projects, such as power generation plants and transport (toll roads, bridges and railways), but also for small and medium-sized projects, such as water treatment plants, hotels or medical facilities.

II. WORK OF OTHER ORGANIZATIONS ON BOT

A. United Nations Industrial Development Organization

11. UNIDO has recently prepared a document entitled "Guidelines for the Development, Negotiation and Contracting of Build-Operate-Transfer (BOT) Projects" (hereafter referred to as "UNIDO Guidelines"). The final English text was in printing at the time of the preparation of this Note. French and Spanish versions will follow later.

12. The three opening chapters of the UNIDO Guidelines provide a general introduction to BOT projects. Chapter 1 ("Introduction to the BOT Concept") outlines the structure, characteristics and parties of a BOT project and also the financing techniques and legal instruments involved; it also contains a summary of the main potential advantages to the host Government of using the BOT approach for infrastructure development. Chapter 2 ("Phases of a BOT Project") briefly describes the phases of a BOT project from the initial identification and definition of the project, Government preparation for tendering, sponsor's preparation and submission of a tender, selection of the best tender, project development, construction phase, operation of the project until the transfer of the project to the host Government. The basic economic considerations in BOT projects are set out in chapter 3 ("Economic Framework for BOT Schemes"). Such considerations include the role of infrastructure in promoting a country's economic development, the potential benefits of the involvement of the private sector in infrastructure projects and the economic benefits and costs of BOT projects.

13. The next three chapters focus on the responsibilities of the Government for the success of a BOT project. Chapter 4 ("The Government's Role in Providing for Successful BOT Projects") deals, inter alia, with matters such as the importance of a credible legal, regulatory and administrative framework to expedite the implementation of BOT projects, the role of various forms of Governmental incentives and the requirement of an orderly and transparent BOT procurement procedure. Having set out the general responsibilities of the Government, the UNIDO Guidelines go on to examine, in chapter 5 ("Transfer of Technology and Capability Building through BOT Projects"), how the host Government should seek to derive benefits from BOT projects for the transfer of technology from the project consortium into the local economy. It also provides examples of contract clauses seeking to ensure the use of domestic goods and services and the protection of improvements and innovations made during the concession period. Chapter 6 ("Procurement Issues and Selection of Sponsors") deals in more detail with the objectives of procurement procedures in selecting the developers of a BOT project and presents a brief overview of the legal and regulatory framework therefor. It also describes competitive tendering proceedings and presents a summary flow chart of tender proceedings.

14. Three chapters are dedicated to financial and economic aspects of BOT projects. The methods for assessing the financial and economic viability of a BOT project are analysed in chapter 7 ("Financial and Economic Appraisal of BOT Projects"). This is followed, in chapter 8 ("Risk Identification and Management"), by a discussion of the main risks to which BOT projects are exposed. That chapter distinguishes between general risks associated with the political and legal environment of the host country and risks specific to the project. Lastly, chapter 9 ("Financial Structuring of BOT Projects") explains how funds are mobilized for BOT projects, describes the types and sources of capital available in terms of the level of risk that each type of capital undertakes, and outlines financial structuring techniques.

15. Contractual matters are discussed in more detail in the following four chapters. Chapter 10 ("The Contract Package") provides a brief description of major contractual arrangements involved in a BOT project, including consultancy agreements, preliminary consortium agreement, project consortium agreement, project or concession agreement, agreement of the Government to purchase the products of the BOT facility ("off-take" agreement), construction agreement, equipment supply contracts, operation and maintenance contract, insurance contracts, financing contracts. Of these interrelated contracts, the project or concession agreement, the construction agreement and the operation and maintenance contract are also discussed separately in the three subsequent chapters. Chapter 11 ("The Project Agreement") identifies the essential elements to be regulated in a project agreement, an agreement between the project consortium and the Government for the development and operation of the project. Chapter 12 ("The Construction Agreement") discusses how the construction agreement in a BOT project usually takes the form of a turnkey contract and briefly considers three main methods of establishing the price to be paid to the contractor: lump-sum or fixed price, price based on reimbursable cost plus fees, and price based on unit prices. In addition, the chapter briefly mentions some key contractual issues, such as keeping to the planned time schedule, assuring quality and proper functioning of the BOT facility, pricing and payment, subcontracting, availability of spare parts, claims by the contractor for additional payment and securing payment obligations. Chapter 13 ("Operation and Maintenance Contract") lists and briefly describes major issues that may have to be addressed in a contract between the project consortium and the company that will oversee the day-to-day operation and maintenance of the BOT facility.

16. The ultimate steps of a BOT project, namely, those concerning the transfer of the project facility to the host Government at the end of the concession period, are discussed in chapter 14 ("Transfer of Ownership"). In particular, chapter 14 considers matters such as possible extension of the concession period, terms and costs of the transfer and warranties upon transfer. The draft UNIDO Guidelines are concluded with a summary, in chapter 15 ("Some Criteria for a Successful Application of the BOT Concept"), of the basic factors that characterize successful BOT projects in developing countries.

B. Economic Commission for Europe

17. Under the auspices of the United Nations Economic Commission for Europe (UN/ECE) and its Working Party on International Contract Practices in Industry of the Committee on Development of Trade ("the Working Party"), a Forum on Attracting Private Investment to Large-Scale Infrastructure Projects in Central and Eastern Europe and the CIS was held in Geneva on 13

November 1995. Among other issues, the agenda of the Forum included legal and financial issues relating to private sector participation in public sector infrastructure project financing, such as what laws are required for creating reliable project finance contracts and whether a BOT law, for instance, is required (the complete agenda of the Forum is contained in the Information Bulletin TRADE/WP.5/53 of 21 July 1995). The participants in that Forum adopted a resolution recommending, inter alia, that:

> "12. an expert group of private- and public-sector representatives be established and charged with developing guidelines on new project financing and construction budget techniques, including BOT, for the countries of central and eastern Europe and the CIS, under the aegis of the [Working Party] (WP. 5);
>
> "13. these guidelines be publicized through seminars and through their publication by the United Nations Economic Commission for Europe, following their submission and ratification by the UN/ECE legal experts, as constituted in the [Working Party] (WP.5)" (TRADE/R.633, Annex).

18. The Working Party accepted the recommendation by the Forum for the establishment of the expert group and decided that its work should be carried out in full cooperation with the European Bank for Reconstruction and Development, which had actively participated at the Forum and had supported this initiative (see TRADE/R. 633, para. 10).

C. The World Bank

19. The World Bank has supported the development of individual BOT projects in a number of countries. While the World Bank may provide assistance to Bank members seeking to establish a legal and regulatory framework favouring foreign investment via BOT projects, the World Bank is not involved in an overall effort to elaborate model legislation or guidelines on BOT legislation.

D. European Bank for Reconstruction and Development

20. The European Bank for Reconstruction and Development (EBRD) is providing financial support to BOT projects in a number of different sectors (e.g., telecommunications, power generation, pipelines, roads, airports and air navigation systems, ports and industrial terminals, water treatment and sewerage, waste management). EBRD also plays an advisory role regarding such projects, including as to some aspects of the legislative framework.

E. International Federation of Consulting Engineers

21. On 30 August 1995, the International Federation of Consulting Engineers (FIDIC), a non-governmental organization with headquarters at Lausanne, Switzerland, held a workshop entitled "Privatization: New opportunities for consulting engineers". For the purposes of that workshop, the word "privatization" was understood to embrace a range of new methods of project implementation, including BOT projects. After discussion, the participants in that workshop agreed that FIDIC should draw up applicable conditions of contract for new methods of project financing.

III. THE ROLE OF AN ADEQUATE LEGAL FRAMEWORK

A. Promoting the confidence of foreign investors

22. The BOT concept has so far mainly been used in the implementation of large infrastructure projects, which require substantial investment from private sources. Most of the funds used to implement such projects are generally obtained by borrowing from commercial banks and other financial institutions. However, the repayment of borrowed funds and the return on the investment take place over an extended period. The lenders to the project and the investors will therefore look for a clear sign by the host Government of its intention to encourage long-term private investments and that such investments will be protected from expropriation or nationalization without fair compensation.

23. One of the means by which the host Governments can express such intention is by providing a sound legal framework that encourages private investment and protects the recovery of the return on the investment. Most of this will be in the form of legislation that governs investments and other general commercial matters and which is not necessarily geared towards BOT projects specifically. The existence of such legislation makes it easier to negotiate specific projects. This is so because, in the absence of such legislation, the contract documents will have to cover various issues and guarantees that would otherwise be covered by legislation, thus adding complexity to the negotiations.

B. Areas of legislation relevant to BOT projects

24. The legislation that, to one degree or another, is relevant to BOT projects falls into two categories. The first category includes legislation primarily geared towards promotion of foreign private investment. The terms of such legislation that will be of particular interest to sponsors of BOT projects and to their lenders will include provisions on private ownership of land and other assets, repatriation of profits, foreign exchange convertibility and public procurement. The second category includes the general commercial legislation of the host country, in particular, on incorporation of commercial enterprises, assignment of trade receivables and other securities arrangements, public procurement as well as an adequate framework governing commercial contracts and dispute settlement procedures.

25. In some of the areas of law just mentioned, there are harmonized legal texts, including texts related to the work of the Commission, which States would be advised to consider for adoption. Those texts include the United Nations Convention on Contracts for the International Sale of Goods, the UNCITRAL Model Law on International Credit Transfers, the UNCITRAL Model Law on Procurement of Goods, Construction and Services, the UNCITRAL Model Law on International Commercial Arbitration, the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

26. Beyond the need for such general legislation, there is often a need to provide more specific

legislation for the implementation of certain aspects of BOT projects. Such legislation not only provides clear signals to potential investors of the interest of the Government in carrying out BOT projects but also facilitates private sector participation in public sector projects. For example, in most States, public infrastructure has traditionally been financed and run, to a large degree, by public sector institutions usually operating as monopolies. In most such instances, there might be a need for providing a legislative basis for private sector participation and, in particular, the right to charge the public for the use of the facility to be built or for its product. Some of the other topics that may usefully be dealt with in such BOT legislation are outlined below in paragraphs 31 to 84.

C. Existing approaches to BOT-related legislation

27. Legislative approaches differ among those States that have enacted legislation for BOT projects. Some States have adopted legislation aimed at regulating the implementation of BOT projects generally. In some cases, such legislation sets out general parameters within which Government agencies can negotiate BOT contracts. This has the advantage of providing flexibility to negotiate the contracts in a way that suits the particular circumstances of each project. Typical provisions of such legislation include, for example: the authorization to grant concessions to the private sector for BOT projects, an indication of those sectors in which BOT projects may be carried out, general rules on how financing may be raised and on incentives that may be granted to entities that wish to carry out BOT projects (including various forms of tax relief). Provisions on procurement, including on methods of solicitation and evaluation of tenders or proposals, are sometimes also included in such legislation.

28. National legislation is in some States enacted to regulate the implementation of BOT projects in particular sectors (for example, power generation, water treatment, toll roads, mass transportation). Typically, such legislation will include provisions on which types of facilities in the regulated sector can be built by way of BOT, the extent of Governmental involvement (including facilities or premises that may be granted by the Government to the project consortium), issuance of approvals for profit recovery (possibly including detailed calculations on the prices that may be charged for the product of the project). Such legislation sometimes also includes special provisions on how procurement for the projects is to be carried out.

29. Another legislative approach to BOT projects is to adopt a piece of legislation on the implementation of a specific BOT project, leaving for the parties to negotiate only the details of its execution. Typically, such legislation will define the basic content of contractual obligations for the implementation of the project, including such matters as the maximum period of time for which concessions may be granted, extent of possible Government support, procurement rules, the means of debt repayment and repatriation of profits, and conditions for the operation and transfer of the project.

IV. OUTLINE OF MATTERS COVERED BY NATIONAL LEGISLATION

30. With a view to facilitating the discussion of the possible scope of a text that the Commission may wish to elaborate in this field, the following paragraphs 31 to 84 provide an outline of issues and legislative solutions found in national laws. In preparing this report, the Secretariat examined legislative and regulatory texts, as well as drafts of legislation relating to BOT type of projects, from some twenty-four countries. It should be noted that, as many countries do not have specific legislation concerning BOT projects, the legislation examined by the Secretariat include other

national laws and regulations potentially relevant for the execution of infrastructure projects under a BOT-type of arrangement, such as laws and regulations on procurement, concession of public services and public utilities.

A. General provisions

1. Fields of concession

31. Many national laws enumerate the areas in which a concession can be granted, such as power production and distribution, water treatment systems, transportation facilities, telecommunications and minerals' exploitation. Some laws state that a concession may be granted where the State has a monopoly established by law. There are also provisions restricting concessions for reasons of national security.

2. Statements of policy

32. Some laws include hortatory provisions expressing principles to be borne in mind when governmental agencies plan and enter into BOT arrangements. Such provisions may be limited to general statements of policy (e.g., to the effect that governmental organs are encouraged to open markets and industries to private and foreign investment) or may be complemented by factors to be taken into account in a decision whether to grant a concession (e.g., showing that savings will be achieved by granting a concession to a private entity, or the effect a BOT project will have on the transfer of technology or the quality of services).

3. Competent governmental body

33. A number of laws establish a new governmental body authorized to enter into a project agreement, whereas other laws delegate that authority to already existing public bodies. According to some laws, a concession requires consent of a higher body such as parliament, council of ministers or a supervisory authority.

34. In addition to requiring authorization for a concession, national laws often require licences for activities carried out in the context of a BOT arrangement, such as the use of public land for specific purposes or installation of some equipment. The authority to issue such licences may lie with different bodies at different levels of Government. The following are examples of provisions designed to facilitate and expedite obtaining such licences: provisions requiring the listing of all necessary licences in the concession instrument; provisions directing a specified body to monitor the issuance of approvals and to help the concessionaire in dealing with the bodies competent to issue licences; provisions that channel, for the purposes of concessions, the issuance of licences through one body; and provisions on deadlines for acting on a request for a license.

4. Planning and coordination

35. In view of the role BOT transactions may play in the national or regional economy, laws provide various means of planning and coordinating such transactions, such as setting up a master-plan for projects that could be the subject of a concession; empowering one organ to authorize

BOT arrangements; obligating that organ to consult with specified other bodies before giving the authorization; making a concession dependent on consent of a local government,if the concession concerns an activity carried out by a body of that local government; imposing a duty to notify specified public bodies about a proposal for a BOT project and to publish such details of proposed projects that are of interest to the public or potential investors; obligating public bodies to coordinate the measures they take in case of unforeseen changes in a BOT project.

36. Furthermore, for the cases of several independent but technically related BOT arrangements (e.g., in the area of telecommunications services), there may be a need for coordination among the concessionaires or prospective concessionaires with a view to ensuring compatibility of technical solutions used. Such coordination is sometimes promoted by requiring that the project agreements contain appropriate provisions on coordination or by providing for proposals to be made to concessionaires.

5. Publicity and confidentiality

37. Laws seek to balance the interest of the Government or the public in having access to certain information concerning BOT projects against the concessionaire's interest in keeping information confidential. It is provided, for example, that the fact that the concession has been granted and specified clauses in the project agreement must be published in a publication or must be accessible to the public. Sometimes the persons that have access to the documents are defined more restrictively, e.g., by reference to the kind of interest they have in the project. In some countries, special registries for concessions are kept and the validity of the contract is made dependent on the registration. On the other hand, some laws guarantee confidentiality of the information that the concessionaire is not required to publicize, for example, by providing that Government officials who have access to information relating to the concession are obligated to maintain such information confidential.

B. Award of the concession

1. Prerequisites and conditions

38. Because of the high investment costs and the need to ensure financial viability of the concessionaire, some laws require that the capital of the company operating the concession (equity capital) is to be not less than a certain percentage of the whole investment. Some laws provide that the project consortium shall be solely responsible for obtaining the required financial means, or limit any public investment to a certain percentage of the whole investment.

39. Many laws contain eligibility criteria and other requirements concerning the shareholders in the concessionaire. Such provisions, for example, expressly allow foreigners to hold shares in the concessionaire; restrict foreign ownership to a certain percentage and reserve the rest for domestic investors; prohibit the participation of persons who are related to the Government (e.g., experts engaged by the Government, public officials, elected representatives and their relatives); oblige the shareholders to disclose their affiliations with companies carrying out the same activity as the concessionaire; confer special preferences to shareholders such as municipalities of the host country regarding, for example, voting rights or rights in new emissions of shares; establish the responsibility of the shareholders for the preparation of the final account of the project, which is to be presented to the Government upon expiration of the concession period or termination of the concession.

2. Preferences to domestic entities

40. Several provisions could be identified which give preference to domestic entities in the context of granting a concession. This is either done within the process of selecting the concessionaire or by obliging the already selected concessionaire to give preferences to domestic third parties. Some laws establish the special obligation of the procuring body to inform all potentially interested domestic entities about a specific project and about the invitation to submit tenders. In addition, when equally advantageous tenders are submitted, the tender of the domestic entity might prevail. Furthermore, laws might include provisions giving preference margins to those tenderers who undertake to employ domestic labour force, contractors or products.

41. Another way to ensure preference for domestic entities is to oblige the concessionaire to make use of domestic products. The same approach can be found regarding the employment of domestic labour: some laws state that in specific phases of the project the concessionaire has to employ domestic personnel. As to the question of what is considered to be a domestic entity, the laws differ: some refer to the ownership, some to the legal status.

3. Selection of the concessionaire

42. A common feature of the laws analysed are provisions on the selection of the concessionaire. A number of laws give the Government considerable freedom in choosing the method of selection, including direct negotiations with one or several prospective concessionaires. Other methods dealt with are similar to those that are described in the UNCITRAL Model Law on Procurement of Goods, Construction and Services as tendering, restricted tendering, two-stage tendering, request for proposals.

43. Under some national laws, it is in principle obligatory to use public tendering. Exceptionally, the use of direct negotiations instead of public tendering is authorized, for example, when a previous public tender was not successful, when the project is to be financed completely from private sources, or in case of unsolicited proposals for BOT arrangements.

44. Laws typically include a list of topics to be mentioned in the invitation to submit tenders and to be considered in evaluating the tenders. These include, for example, the structure of the price to be charged by the concessionaire, possibility of increases of that price, governmental subsidies to be granted or expected to be granted to the concessionaire, the degree of exclusivity to be enjoyed by the concessionaire in operating the project, duration of the concession period, termination of the concession, transfer by the concessionaire of the project to the Government after the end of the concession period.

45. In case of unsolicited proposals, some laws allow direct negotiations with the prospective concessionaire, while others require that, if the Government is willing to grant a concession of the kind proposed, public tendering should be carried out on the basis of technical solutions of the unsolicited proposal. In such public tendering, some laws allow a margin of preference (e.g., 10%) to the tenderer that had submitted the unsolicited proposal. The purpose of the margin of preference is to compensate that tenderer for the costs of preparing the unsolicited proposal and to provide an incentive for submitting such new proposals.

46. In many cases the company that will operate the concession has not yet been established at the time of the selection of the project consortium that will finance the project. Therefore, some laws deal with the obligation of the consortium to found that company (concessionaire) within a specified period after the selection of the consortium. Failure to establish the company within the time period typically leaves the Government free to grant the concession to another entity.

47. It appears that, except as noted below, the policies underlying the provisions in national laws on the selection of the concessionaire are broadly the same as those on which the UNCITRAL Model Law on Procurement of Goods, Construction and Services is based. A specific consideration characterizing the process of selecting the concessionaire is the particularly high cost of preparing the technical, commercial and financial elements of a BOT project, which is the reason for a margin of preference given to the prospective concessionaire who has submitted an unsolicited proposal. Another specific consideration may apply when several BOT projects are to be implemented in an industrial sector where competition is limited (e.g., telecommunications or supply of water, gas or electricity). In such cases, if the Government has an interest in fostering competition in those areas, it may wish to grant the concessions to more than one project consortium, even if the evaluation of other elements of their proposals would suggest granting the concession to one concessionaire.

4. Selection of subcontractors

48. The following types of provisions on the selection of the concessionaire's subcontractors may be found in laws: an obligation to specify in the tender the percentage of the total value of work that will be subcontracted; an obligation to identify the subcontractors before being granted the concession; a minimum percentage of the value of the project that must be subcontracted to companies that are not affiliated to the project consortium; an obligation to use competitive methods, including tendering proceedings, for selecting subcontractors. Some laws contain provisions that favour subcontracting to companies from the country where the project is to be implemented (e.g., particular measures to notify potential domestic subcontractors or participation of domestic subcontractors as an evaluation criterion for selecting the concessionaire).

49. An international financing agency provides in its guidelines on BOT related procurement that, if the concessionaire has been selected by a suitable competitive method, the concessionaire is free to select subcontractors, whereas if a competitive method has not been used for the selection of the concessionaire, such methods must be used for the selection of subcontractors.

5. The project agreement

50. The range of issues to be covered in the project agreement between the Government and the concessionaire may sometimes be provided by law. Thus, some national laws require that the project agreement define the activities that are the subject of the concession. Some laws require that the project agreement contain provisions on financial matters, such as the type and amount of financial guarantees given to the Government for the performance of the project agreement, the concessionaire's right to the benefits obtained from the activity that is the subject of the concession, the concessionaire's obligation to pay any concession fee to the Government, the criteria or method for determining and adjusting the price to be charged by the concessionaire. National laws may also mandate that the project agreement provide for some degree of supervision by the State.

51. Some national laws may further define the rights and obligations of the parties by requiring that the project agreement provide for matters such as quality standards and performance control, compensation to the concessionaire for additions or improvements to the facility, the concessionaire's liability for failure to meet its obligations under the project agreement, including penalties or liquidated damages in case of breach of contract, consequences of a delay in the completion of the project, revision and amendment of the project agreement, early termination and settlement of disputes.

52. National laws also prescribe that the project agreement stipulate the preference, if any, given by the concessionaire to the employment of domestic labour and domestic suppliers, training of employees or any requirement related to the protection of the environment, areas protected by law, national security and public order.

C. Rights and obligations of the concessionaire

1. Nature of the concession

53. Several laws include provisions defining the legal regime of the concession and the nature of the concessionaire's rights. For instance, some laws provide that the concession concerns a public service, that it is exercised on behalf of the State, or that the right conceded has to be exercised in conformity with the public interest. Furthermore, national laws generally provide that the State retains the ownership of all public assets involved in the concession, while the concessionaire is only granted the right to use and possess those assets.

2. Obligations

54. Many laws include provisions defining the obligations of the concessionaire that arise out of the project agreement. These refer basically to the duty to implement the project and provide the relevant service in an adequate and diligent manner according to the provisions of the project agreement. National laws may also impose more specific obligations upon the concessionaire, such as the obligation to purchase some type of insurance, to provide guarantees for the completion of different project phases (e.g. by a performance bond), to use and transfer new technology in the implementation of the project, to take good care of any public property.

3. Ancillary revenue sources

55. The concessionaire, in addition to pursuing the core of the concession, might be able and willing to pursue other activities in order to generate additional income. For example, in connection with a concession to build and operate a toll road, the concessionaire may be given permission for land development alongside the road so as to supply fuel, provide car servicing, sell publicity space, or run motels, restaurants or shops. Such ancillary activities may enhance and diversify the sources of income of the concessionaire enterprise and thus offset the concessionaire's risk that the revenue from the basic concession activity would not be sufficient to provide a reasonable rate of profit. Profitable ancillary activities may also serve as an alternative for governmental guarantees.

56. In some national laws it is expressly provided that the concessionaire is allowed to pursue only the activities of the concession and those functionally connected with the core activity. Other laws mention the possibility of authorizing the concessionaire to provide ancillary services. In that connection, it is provided that the Government, in evaluating the tenders by prospective project consortia, will also take into account the number and magnitude of the ancillary services that tenderers expect to be allowed to provide. Some laws mention that the concessionaire may or may not be given a degree of exclusivity with respect to providing ancillary services. For cases where the concessionaire is engaged in ancillary activities, provisions also exist to the effect that the concessionaire must not, directly or indirectly, by way of contract or through the use of technical specifications, compel the purchasers of its core goods or services to purchase from the concessionaire also ancillary equipment or maintenance services.

4. Assignment, subconcession, encumbrances

57. National laws provide divergent answers to the possibility of assignment, whether partial or total, of the concessionaire's rights. While some laws authorize such assignment, normally subject to prior governmental approval, others prohibit any form of assignment. Different solutions can also be found among those laws allowing assignment. Some national laws only permit complete assignment of the concession, including all the rights pertaining to it, while the laws of other States authorize partial assignment of some rights.

58. Similarly, national laws are not unanimous as to whether the concessionaire may award subconcessions. Some laws require prior governmental approval for any subconcession, while others expressly reject such possibility.

59. Some laws authorize the concessionaire to offer the assets and premises that are the object of the concession as collateral for the concessionaire's obligations. In such cases, some laws require, however, that those assets and premises continue to be used for the purposes of the concession.

D. Governmental obligations and undertakings

1. Financial incentives and guarantees

60. Notwithstanding the fact that one of the main purposes of BOT projects is for Governments to avoid having to mobilize public money for a project, there are many BOT projects where the Government provides some sort of financial support to the project. Incentives offered by the Government include subsidies, no-interest loans, exemption from stamp duties and other fees, exemption from, or preferential rates for, import duties on equipment used in the project, or even some type of insurance coverage by the State. In some cases, the Government is, to a limited degree, providing guarantees. The Government may guarantee, for example, the right of the project consortium to convert the currency earned through the BOT project into another currency (usually a freely convertible one) or the availability of sufficient foreign currency for such conversion. The Government may also guarantee the right to transfer proceeds from the project to a foreign country, the right to sell a certain amount of goods or services resulting from the BOT project to a Governmental agency (so as to ensure a minimum flow of income to the concessionaire), or the availability of short term financial loans or guarantees for such loans in case of cash-flow difficulties which arise form extraordinary and unforeseen circumstances. The Government may further guarantee the repayment of a part of loans given to the project consortium, or guarantee that the price of goods or services supplied to the Government by the

concessionaire (or the price charged to customers subject to price control of the Government) will be sufficient to cover the costs and provide a reasonable rate of return.

61. Some other laws do not specify the type of guarantee that the Government is authorized to provide. Laws of this group may limit themselves to mentioning that Governmental guarantees may be given, or that guarantees, if granted, should be spelled out in the project agreement, or that, in evaluating offers from prospective concessionaires, the Government will take into account the Governmental guarantees requested. Finally, some laws, apparently motivated by the consideration that BOT projects should not engage public money, exclude such incentives altogether, or limit them to a certain percentage of the whole investment or of the equity capital of the company operating the concession.

2. Assurances

62. In addition to possible financial guarantees, laws often include provisions for other kinds of assurances by the Government. Laws provide, for example, that the Government will treat preferentially the concessionaire in respect of rights to use land, roads and other supporting public facilities; that the Government will use reasonable endeavours to build the infrastructure necessary for a satisfactory operation of the BOT facility (e.g., road links, terminals); or that the project agreement may stipulate that certain conditions will be maintained and that, should such conditions change, the concessionaire is entitled to compensation, readjustment of its remuneration or even termination of the project agreement. Furthermore, there are provisions similar to those typically found in investment protection treaties, including guarantees to respect private property and to ensure that any redemption of the concession will only be done by the decision of a specific body of the Government and against fair compensation.

3. Taxation

63. Some legislation makes provision for a preferential tax treatment of BOT projects, either by a straightforward provision or by providing that, subject to approval by a specified body, such treatment may be available. The types of tax benefits vary from country to country and may include any of the following: a preferential revenue tax, possibly staggered over different stages of the project (e.g., the preference, highest during a period after the first profit making year, may diminish with the years); a preferential tax rate for expatriated profits, if such a special tax exists; preferential turnover tax on goods or services produced at the BOT facility; exemption from custom regulations.

E. Operation of the concession

1. Price setting and price increases

64. In view of the fact that the concessionaire often operates a facility that enjoys a degree of monopoly, many laws address, directly or indirectly, the question of the prices to be charged by the concessionaire. Some laws do not address themselves the price adjustment policy but leave this issue to the project agreement. Other laws, however, establish some control system for the prices charged by the concessionaire. This is done either by price setting by the Government or a regulatory body, or by the concessionaire subject to prior approval by the Government. Lastly, in

laws dealing with specific projects or a narrowly defined area of concessions, the concessionaire may sometimes be given the freedom to charge the rate it thinks is reasonable.

65. Governmental control over price setting and price increases is subject to different rules. Some laws limit themselves to stating only that the prices must be just, reasonable or fair. Some laws state additional criteria, which might be, for example, that the prices must not exceed the amounts needed to recover the investment, cover the costs and leave a reasonable profit; that prices may be adjusted so as to reestablish the initial economic and financial balance of the contract; that the prices are to be linked to a price index; that sets of standardized quality control criteria (such as those prepared by the International Standard Organization) have to be used for measuring the quality of performance. There are also laws that mention social interests as a criterion. In addition, some laws provide the possibility to decrease prices if the concessionaire's profits are higher than a prior set rate of return on investment. Some laws restrict the frequency of price increases (e.g., once a year).

66. Some laws provide for the concessionaire's obligation to publish the prices and any changes, and for its obligation to adhere to the published prices. In addition, some laws require equal treatment of customers as regards the prices (as well as regards other contract conditions). In some cases, different treatment of specified categories of customers is allowed. When the concessionaire supplies different types of goods or services, there are also provisions dealing with the possibility of "internal subsidizing" in the sense that one price may be reduced, provided another one is appropriately increased. One law provides that if the Government determines a price that is below the level stipulated in the contract (which might occur, for example, because of social concerns) the State will pay the difference. One law provides for conciliation and specifies the composition of the conciliation panel and the conciliation procedures, in order to facilitate agreement on the price between the Government and the concessionaire.

2. Monitoring of project implementation

67. While national laws often give the Government some level of control and monitoring over the concession, the particular control and monitoring mechanisms may differ considerably from case to case. Some laws simply require that the project agreement stipulate some type of control by the Government. Other laws include provisions establishing a general monitoring right for the Government and even identifying various specific rights, such as the right to have access to all documents and records, to enter the property of the concessionaire, or to obtain periodic reports from the concessionaire. In some cases, the Government is given the right, under differing conditions and circumstances, to temporarily assume the control and operation of the project. Some national laws further provide that the Government shall hold a "golden share" in the concessionaire company which gives the Government the right to veto corporate decisions, such as changes of capital or transfer of shares. Moreover, some laws provide for the establishment of a separate agency or the office of a special inspector.

68. Furthermore, some laws give the Government the authority to require changes in the project, in case the original plan is deemed to be insufficient or if the public interest so requires. In such cases, some laws provide for compensation for the concessionaire's added costs, while other laws refer this matter to the project agreement or give the concessionaire the right to withdraw from the contract.

F. Relations with customers

69. A number of national laws contain specific provisions dealing with customer issues. The following are examples of provisions in national laws that protect customers of the concessionaire: the obligation to conclude a contract with all interested parties, the duty not to discriminate any user group, the obligation to publish the general conditions and prices used by the concessionaire, provisions requiring submission of the general conditions to a competent body for approval, the obligation to issue receipts if so requested by the customer, the obligation to have in place an internal review procedure in case of complaints by customers, the right of the customers to direct complaints concerning the concessionaire's activities to a public body, and, as provided in some laws, the obligation of that body to investigate the complaint and take a decision.

G. Relations with competitors

70. Some laws provide that, as a condition for granting a concession, the concessionaire must enter into agreements, the features of which are specified in the concession, with competitors providing the same or similar services or goods as the concessionaire. Such agreements may concern the use of the same technical standards, or, for example in the area of telecommunications, the obligation to share communications infrastructure.

H. Performance by the concessionaire

1. Breach of the agreement

71. A number of laws limit themselves to requiring that the project agreement deal with the breach of the agreement by the concessionaire and the consequences of the breach (in particular payment of penalties or liquidated damages, termination of the agreement, the right to demand payment under the guarantees given to the Government).

72. Other laws, in addition to requiring that the agreement deal with these matters, distinguish between a breach committed during the construction period and a breach during the operation of the project, give examples of the two kinds of breach and provide for different consequences according to the case.

73. Other laws deal with the breach in the context of termination of the project agreement and provide examples of breach that may result in termination (e.g., failure to accumulate the finance to construct the facility, to prepare the technical documentation required to commence the construction works, to observe the technical regulations in carrying out the construction, to complete the investment process in time, to maintain the facility in accordance with the agreed standards, to provide agreed information to the Government, to meet the minimum standards of the services as required by the agreement, or charging of higher prices than permitted under the agreement). Some laws provide that the project agreement may be terminated only in cases of a grave breach of the agreement.

74. Some laws oblige the concessionaire to indemnify the Government for any claims against the Government raised as a result of the activities of the concessionaire.

2. Impediment

75. There is wide divergence in national laws dealing with circumstances that impede the performance by the concessionaire under the project agreement. Some laws provide for the termination of the project agreement in case the concessionaire is rendered unable to perform due to an unforeseeable change of circumstances beyond the concessionaire's control. Other laws provide for an extension of the concession period, so as to give the concessionaire the opportunity to adjust to the new circumstances. In that event, some laws contemplate some form of financial assistance by the State, while other laws exclude any form of assistance not originally provided for in the project agreement. Another group of national laws authorizes a revision of the project agreement so as to reflect the change in circumstances.

I. Termination of concession

1. Common grounds for termination

76. Various grounds can be found in national laws for the termination of the concession. Commonly, national laws provide for one or more of the following grounds: mutual consent, expiry of the concession period, death, dissolution or bankruptcy of the concessionaire, repurchase of the concession by the Government, expropriation or other form of seizure by the Government, change of governmental plans and priority, in case of public interest, national defense or security, major breach of the agreement by either party.

77. Some laws provide for the consequences of termination, depending on the reason therefor. In case of insolvency, for instance, some laws provide the possibility of a so-called "step-in" right in favour of interested third parties (normally creditors of the concessionaire), which may include a right to claim the transfer of the concession.

2. Extension

78. The extension of the concession beyond the expiry of its term is a possibility which is not equally accepted in national laws. Some laws authorize an extension only if expressly permitted in the project agreement and under specific circumstances. Other national laws generally authorize the Government to grant an extension of the concession, provided that the concessionaire is not in breach of any of its main obligations. Some national laws impose a limit on the maximum period of extension, or provide for only one extension without public tendering. Some national laws, however, give the concessionaire a right to an extension of the concession under the same terms, or provide for an automatic renewal of the concession, if neither party gives notice of termination.

3. Transfer of the facility to the Government

79. A common feature of the laws examined is to provide for a transfer of the complete project to the Government, free of charge and liabilities, upon expiry of the concession period. In addition, some national laws provide for a transfer before the expiry of the concession period by means of repurchase by the Government and payment of reasonable compensation to the concessionaire.

80. Various solutions are found, however, as to the procedure for such transfer. While some national laws provide that the transfer takes place automatically at the end of the concession

period, other national laws require the execution of some form of act of transfer by the concessionaire. National laws also differ regarding what assets are to be transferred. Some laws distinguish between assets which were originally attached to the concession, and which have to be returned to the Government, and assets which were acquired during the concession period and meant for its operation, which the concessionaire may retain or regarding which the concessionaire may claim compensation.

81. Some national laws give the Government an option to require, instead of the transfer, the complete removal of the project facilities at the concessionaire's expense, in the event the Government at the end of the concession decides that it is not in the national interest to keep the project facility.

J. Miscellaneous provisions

1. Governing law

82. Many of the laws analysed include provisions on the law governing the project agreement. Some laws provide for the applicability of the law of the State that is granting the concession. Some of those laws specify that a concession is a private law agreement, to which the law of contract applies, while others provide that a concession is a matter of public law and that administrative law applies.

83. Other laws expressly allow the choice of a national law other than the law of the State granting the concession; some of those laws indicate issues to which the law of the State granting the concession will apply, notwithstanding an agreement on the applicable law (e.g., the transfer of technology, accounting, statistics, labour relations, foreign exchange controls, export and import regulations, residency of persons and travel regulations). There is also a law providing that, in addition to using a national law for certain issues, recourse may be had to the relevant principles of international law and, if the parties in dispute so agree, to the principles of equity.

2. Settlement of disputes

84. Some laws state that the project agreement is to contain a dispute settlement clause without specifying anything further about the content of the clause. Other laws provide that any disputes will be settled by the competent courts of the State granting the concession. Yet other laws expressly allow submitting a dispute to arbitration; according to one law, arbitration may be agreed upon as long as this has been stipulated in the invitation to tender; another law provides that any arbitration is to take place in the State that has granted the concession. There are also laws that provide that conciliation should be attempted before resorting to the procedure for a binding settlement of the dispute.

CONCLUSION

85. BOT transactions can play a major role in the economic policy of a State. In the experience of a good number of States, it was necessary, in order to attract investors for BOT projects, to adopt legislation on such transactions. A brief survey of such legislation is contained above in chapter IV.

86. Solutions included in national laws show different approaches, as well as different levels of detail and sophistication. While some States have enacted general legislation on BOT projects, others have adopted specific legislation on various industrial sectors, such as power generation, development of maritime terminals or water treatment. In some cases, laws were adopted for individual BOT projects.

87. National laws also provide different solutions to apparently similar or identical issues and those solutions are likely to have an impact on the country's ability to attract foreign investment through BOT projects. These differences may result from differences in underlying policies; those policies, and how they are expressed in legislative form, may also be influenced by whether the law applies to BOT transactions in general or whether it is limited to BOT projects in a specific industrial sector. To a certain extent, however, varying national solutions may also occur because drafters of the laws did not have access to the experience and solutions in other States, and did not have model solutions available, in particular solutions that are internationally harmonized.

88. As noted above in paragraphs 11 to 21, the organizations that have done work in the area of BOT transactions are not working to provide comprehensive guidance to national legislators regarding BOT projects.

89. The Commission may wish to conclude that it would be useful for States to have legislative guidance in preparing or modernizing their legislation relating to BOT projects, and that the Commission should prepare such guidance.

90. As to the form of such guidance, the Commission may wish to consider that any preparatory work should aim at providing a guide for legislators by describing legislative objectives, considering possible solutions for achieving those objectives and discussing their advantages and disadvantages. In the light of the progress of the work, the Commission might wish to determine whether it would be feasible and desirable to prepare model legislation.

91. Should the Commission decide to undertake work in the area of BOT, it may wish to request the Secretariat to review, with the assistance of an expert group and in cooperation with other international organizations having the expertise in BOT arrangements, possible issues on which legislative guidance may be useful and prepare first draft chapters of a guide for consideration by the Commission. As to the scope of the work, the Commission may wish to consider that, at least initially, the work should be geared to BOT projects in general. It could then be decided during the preparatory work whether it would be useful to add special considerations or model provisions relating to specific industrial sectors.

92. As for any work on contractual aspects of BOT, the Commission may wish to request the Secretariat to continue monitoring the work of other organizations, such as the Economic Commission for Europe and the International Federation of Consulting Engineers (FIDIC). In the

light of theirs work, the Commission might at the appropriate time consider forms of cooperation with those organizations (e.g., review of their draft and recommendations thereon by a Working Group with a view to later endorsement by the Commission). The Commission may also decide to prepare itself a legal guide on selected types of contract clauses in project agreements between Governments and concessionaires that give rise to particular difficulties.

* * *